Supreme Court, U.S.
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No. 06-199

In The
SUPREME COURT of the UNITED STATES

CARLOS PACHECO
Petitioner

v.

MARIA CINO, Acting Secretary of Transportation, DEPARTMENT OF TRANSPORTATION, Federal Aviation Administration
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Introductory Statement

Petitioner Carlos Pacheco is an air traffic controller employed by Respondent in Corpus Christi, Texas. He filed a charge of discrimination with the EEO office after he was not selected for a promotional position. In his EEO charge of discrimination, Pacheco charged in part "...once again the "good old boy" was selected even though I was more qualified..." Pacheco then filed suit in district court alleging discrimination under both disparate treatment and disparate impact theories. The district court dismissed Pacheco's disparate impact claim pursuant to Fed. R. Civ. Proc. 12(b)(1) finding it lacked jurisdiction because he had failed to exhaust his administrative remedies with respect to that theory.

The Fifth Circuit court of appeals affirmed dismissal under Fed. R. Civ. Proc. 12(b)(1) finding that a disparate impact claim could not reasonably be said to grow out of Pacheco's charge of discrimination based on his description of the charged discrimination as primarily intentional and failure to identify a neutral employment practice.

Question No. 1

Does an EEO charge which alleges discrimination under Title VII encompass both disparate treatment and disparate impact theories, or is a charging party required to identify the employment policy or practice in the charge of discrimination?

Question No.2

Is filing a charge of discrimination under Title VII a jurisdictional prerequisite or a condition precedent subject to waiver, estoppel and equitable tolling?

PARTIES IN THE FIFTH CIRCUIT COURT OF APPEALS

The following persons and counsel were parties to the proceedings in the court of appeals.

1. Carlos Pacheco, Plaintiff/Petitioner

2. Norman Y. Mineta, Secretary, Department of Transportation, Federal Aviation Administration, Defendant/Respondent

3. Regina Bacon Criswell, Attorney for Plaintiff/Petitioner

4. Mr. Robert Shaw-Meadow, Assistant U.S. Attorney for Defendant/Respondent

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OPINIONS BELOW

The May 5, 2006 opinion of the Fifth Circuit Court of Appeals is reported at 448 F.3d 783 (5th Cir. 2006) and is included in the Appendix at pages 1-22. The September 14, 2004 order of the district court is not officially reported and is included in the Appendix at pages 23-29.

STATEMENT OF JURISDICTION

The opinion of the court of appeals for the fifth circuit was entered on May 5, 2006. (App 1-2) The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1254(a).

THE STATUTES and RULES INVOLVED

29 CFR § 1601.12 governs the contents of a charge of discrimination and provides in relevant part as follows:

> (a) Each charge should contain the following:
> (3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See §1601.15(b); and
>
> (b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of....

42 U.S.C. 2000e-5(b) provides in relevant part:

> "Whenever a charge is filed by or on behalf of a person claiming to be aggrieved,... alleging that an employer ... has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer... within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires."

42 U.S.C. 2000e- 5(e) provides in part:

> "a charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter...."

Fed. R. Civ. Proc. 12(b)(1) provides:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter..."

Fed. R. Civ. Proc. 8(a)(2) provides:

> "A pleading which sets forth a claim for relief,...shall contain ...a short and plain statement of the claim showing that the pleader is entitled to relief..."

STATEMENT OF THE CASE

This is an employment discrimination case premised on Title VII of the Civil Rights Act. Pacheco, an air traffic controller employed by the FAA in Corpus Christi, Texas filed a charge of discrimination based on his national origin, Hispanic. He later filed suit in federal district court alleging discrimination under both disparate treatment and disparate impact theories. The district court granted the FAA's motion to dismiss Pacheco's disparate impact claim pursuant to Fed.

R.Civ.Proc. 12(b)(1) finding it lacked jurisdiction because Pacheco's charge of discrimination did not address his disparate impact claim.

The Fifth Circuit court of appeals affirmed dismissal of Pacheco's disparate impact claim pursuant to Fed. R. Civ. Proc. 12 (1)(b), finding that the charge of discrimination could not be fairly read to include a disparate impact claim. The court recognized disagreement in the fifth circuit regarding whether the exhaustion requirement of Title VII of the Civil Rights Act is jurisdictional or a condition precedent, subject to waiver and estoppel. Jurisdiction of the United States District Court was premised on a federal question and invoked pursuant to 28 U.S.C. §1331. Jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to 28 U.S.C. § 1291.

ARGUMENT

The questions presented for review are compelling because they involve important questions of federal law that have not been, but should be, settled by this court. Does a charge of discrimination encompass both disparate treatment and disparate impact? Is a charging party required to identify an employment policy or practice in his charge of discrimination in order to exhaust administrative remedies for a disparate impact claim? Is the exhaustion of administrative remedies requirement in Title VII employment cases a jurisdictional prerequisite or a condition precedent subject to waiver, estoppel and equitable tolling. Writ of Certiorari should be granted to answer these important questions of federal law.

Scope and Content of the Charge of Discrimination

Does a charge of discrimination filed pursuant to Title VII of the Civil Rights Act encompass both disparate treatment and disparate impact theories of discrimination? Is a charging party required to identify an employment policy or practice in

the charge of discrimination in order to pursue a disparate impact theory in the courts?

In Watson v. Forth Worth Bank and Trust, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988), this court extended the disparate impact analysis to subjective employment criteria. Justice O'Connor joined by the Chief Justice, Justice White and Justice Scalia concluded in part that when subjective selection criteria are at issue, the plaintiff may have difficulty satisfying the initial burden of identifying the specific employment practice that is allegedly responsible for any statistical disparity, especially when both subjective and objective criteria are utilized. Id at 979. Although the court observed that Watson filed a discrimination charge with the EEOC and exhausted her administrative remedies, the details of the charge nor the manner in which the issue was framed for investigation are discussed.

In Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) this court held that a plaintiff need not prove intentional discrimination to prove a violation of the Civil Rights Act. In discussing the Griggs decision, the Watson court observed that the primary difference between disparate treatment and disparate impact cases is the evidence needed to prove the theory; disparate impact cases generally focus on statistical disparities where as disparate treatment cases focus more on specific incidents. The court further noted that although the evidentiary basis for each theory is different, the ultimate legal issue in either case is the same; i.e. whether unlawful discrimination occurred. See Watson at 987.

Concluding that the disparate impact analysis applied to subjective selection practices, the Watson court considered the evidentiary burdens applicable in a disparate impact case. To establish a prima facie case, the plaintiff must not only show a statistical disparity but also identify the employment practice

that is challenged. See id at 994. Once the practice is identified, then causation must be established by offering statistical evidence that shows the practice has excluded applicants because of their membership in a protected group.

The Watson court specifically recognized that it may be difficult for a plaintiff to identify the employment practice or policy that is responsible for any alleged disparity where the selection practice is entirely subjective or combines both subjective and objective criteria. Moreover, the Watson case considered the evidentiary burden in the context of a lawsuit, and not in the context of a charge of discrimination.

Although the Watson case applied the disparate impact analysis to selection practices that are entirely subjective or to those that combine objective and subjective criteria, this court has not addressed the issue of the sufficiency of a charge of discrimination for purposes of pursuing a disparate impact theory in the courts.

29 CFR § 1601.12 governs the contents of a charge of discrimination and provides in relevant part as follows:

> (a) Each charge should contain the following:
> (3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See §1601.15(b); and
>
> (b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of....

The Fifth Circuit opinion recognizes that charging parties generally unrepresented by counsel at the EEO stage should not be held to exacting standards with respect to the contents of the charge of discrimination. In that regard the Fifth Circuit evaluates a charge of discrimination for exhaustion purposes not only by the contents of the charge but also by the scope of any investigation that "can reasonably be expected to grow out of the charge of discrimination." (App 13-18) Applying this analysis to Pacheco's charge of discrimination, the court concluded that a disparate impact investigation could not reasonably be expected to grow out of the charge of discrimination because the charge 1) facially alleged disparate treatment; 2) it identified no neutral employment policy; and 3) it complained of past instances of disparate treatment only. (App 28)

However, the Fifth Circuit's opinion did not mention or otherwise evaluate Pacheco's charge in the context of his statement that "once again the 'good old boy' was selected even though I was more qualified..." (App 22-28) A policy or practice of selecting applicants based on a "good old boy" system where applicants are selected based on past or current associations, friendships, or other criteria unrelated to job qualifications or experience is a practice that can most certainly have an unintentional discriminatory impact on protected individuals and groups. Consequently, although Pacheco did not identify a particular policy or practice in his charge, his reference to selection of the "good old boy" despite his superior qualifications was sufficient to put the EEO office on notice that a disparate impact claim might be involved.

The Fifth Circuit opinion considered decisions from two district courts, one in Texas and the other in New York, and also considered an opinion from the Second Circuit court of appeals related to exhaustion of administrative remedies with respect to a disparate impact claim. In Grace v. Bank of

America, No. Civ. A. 303CV 1294D, 2003 WL 23095993 (N.D. Tex. Dec. 23, 2003) the district court ruled that a plaintiff who filed an administrative charge based on a race-based firing did not exhaust her disparate-impact claim, finding that "a claim for disparate impact is not 'like or related to' the plaintiff's EEOC charge nor could it reasonably be expected to grow out of [it]."

In Woodman v. WWOR-TV, 293 F. Supp. 2d 381, 390 (S.D.N.Y. 2003) the district court held that the plaintiff's administrative charge could be reasonably expected to lead only to an investigation of age-based disparate treatment, not age-related disparate impact. The plaintiff had filed an age-discrimination charge with the EEO alleging that: "[A]ll of my nine colleagues at BHC/WWOR who were fired, except two, were over the age of 40. On the other hand, my counterpart in Los Angeles, who is much younger, was not fired. It seems, therefore, that age was a motivating factor in my employment termination." The court held that it was not enough for the plaintiff to have alleged that other colleagues were affected because she had failed to "identify a specific, facially neutral employment practice." Id. The court concluded that the plaintiff's administrative charge complained of intentional age discrimination which was a crucial element in a disparate-treatment claim but unnecessary in a disparate-impact claim. Id.

In Gomes v. Avco, 964 F.2d 1330, 1335 (2d Cir. 1992) the Second Circuit held that the administrative charge exhausted both a claim for disparate-treatment and disparate-impact discrimination. In that case the administrative charge stated the plaintiff was passed over for promotion because of his Portuguese ancestry. He claimed (1) he applied for a promotion; (2) such promotions are governed by an "eight-years experience" rule; (3) he met the eight-year experience requirement; (4) the promotion was given to

someone less qualified; and (5) he was the only Portuguese employee in his job classification. The Second Circuit court of appeals found that "[t]o be sure, this complaint most naturally supports a claim of intentional discrimination . . . nonetheless, once the EEOC investigated the case and found that [the plaintiff] did not satisfy the eight year rule, it would have been perfectly natural for the EEOC to question the necessity of the eight year rule itself." Id. at 1334.

In evaluating these decisions, the Fifth Circuit observed that the Gomes court found that an allegation that plaintiff was the only Portuguese employee in his job classification would reasonably lead the EEOC to consider disparate impact and the allegation that less-qualified people were promoted ahead of him might lead the EEOC to question the business justification for such a rule. However, the Fifth Circuit put great emphasis on the fact that in Gomes, unlike in Grace and Woodman, the plaintiff had identified a facially neutral employment policy that provided a foundation for an EEO disparate-impact investigation in addition to his disparate treatment claim.

Although not cited by the Fifth Circuit, other courts addressing the exhaustion requirement in a disparate impact case include Butler v. MBNA Technology, Inc. No. Civ. 3:02-CV-1715-H [2004 WL 389101] (N.D. Tex. March 2004); Buenrostro v. Flight Safety International, Inc., No. SA-99-CA-0819-FB [2001 WL 674171] (W.D. Tex. March 2001); Daniels v. Nationwide Insurance, No. 99C757 [1999 WL 753945] (N.D. Ill. Sept. 1999); McKinney v. Eastmon Kodak Co., 975 F.Supp. 462, 467 (W.D.N.Y. 1997); and Burton v. Illinois Education Ass'n., No. 95 C 5799 [1999 WL 754142] N.D. Ill Nov. 1997).

The Butler decision provides little factual guidance because the disputed issue was whether the defendant as prevailing party was entitled to costs and attorney fees. The Plaintiff

voluntarily dismissed her disparate impact claim once summary judgment was filed and the court considered whether to award defendants' costs and attorney fees on that claim. Concluding the disparate impact claim was dismissed to avoid an adverse judgment on the merits the court found the charge did not support a disparate impact claim without a detailed discussion of the factual allegations of the charge.

At the district court and on appeal to the Fifth Circuit in this case, the FAA relied on the Magistrate Judge's recommendation in Buenrostro. In Buentostro the plaintiff attempted to proceed on a disparate impact theory in connection with her claims of discrimination. Summary judgment was granted to the employer and she appealed but did not raise dismissal of her disparate impact claim.[1] The Magistrate Judge recommended that the disparate impact claim be dismissed because that theory was not exhausted administratively. The Magistrate Judge concluded that the charge included facts related to treatment on an individual basis and did not complain of a specific company policy or practice or impact on any other employee. The Magistrate Judge also concluded that even if a disparate impact claim was before the court, Buenrostro should not be allowed to proceed on that theory without pleading the specific practice that had a discriminatory impact on Hispanic females.

In three other cases relied upon by the FAA Daniels, McKinney, and Burton cited infra, the courts also found that the plaintiff could not pursue a disparate impact claim because that theory had not been exhausted administratively.

1

A Fifth Circuit unpublished opinion relates to Buenrostro's appeal, but does not address disparate impact since Buenrostro did not pursue dismissal of that claim on appeal.

It is clear that in cases where exhaustion of administrative remedies was evaluated with respect to a disparate impact theory, courts have generally refused to find that exhaustion was satisfied where the charging party failed to include facts referencing some employment practice or policy alleged to have a discriminatory effect. Yet, this approach ignores the very essence of what this court observed and recognized in Watson, i.e. that in cases involving subjective selection criteria it may often be difficult for a plaintiff to identify the practice or policy that allegedly has the discriminatory effect. Moreover, and even more importantly, requiring a charging party to identify an employment policy or practice in the charge of discrimination as a pre-condition to pursuing that theory in the courts completely ignores the evidentiary issues related to this claim. Most often, the employment practice or policy which has a disparate impact will not be identified until the parties have engaged in discovery.

Beyond the evidentiary issues related to a disparate impact claim, requiring a charging party to identify an employment practice or policy in a charge of discrimination is contrary to the express requirements of 29 CFR §1601.12 which governs the contents of a charge of discrimination and specifically states that a charge is sufficient if it "describes generally the actions or practices complained of."

Although the Fifth Circuit court of appeals recognized that unrepresented charging parties are not required to check any particular box or use any particular language to satisfy the exhaustion requirements, the court found that a disparate impact claim does not relate to a disparate treatment claim because of the different elements of proof required to establish each claim. Essentially, unless a charging party identifies an employment practice or policy in his charge of discrimination, he has failed to exhaust his administrative remedies and may not pursue this theory of discrimination in the courts. This

interpretation of the law is untenable because it operates to the detriment of the individuals and groups of persons that anti-discrimination laws were intended to protect. Moreover, it is contrary to legislative intent that the requirements of Title VII of the Civil Rights Act be liberally construed.

Further, it is inconsistent with the purpose of anti-discrimination laws for courts to evaluate charges of discrimination on the basis of the evidentiary standards applicable to pleading and proving a prima facie case of discrimination, whether based on disparate treatment or disparate impact. Evaluating charges on this basis will almost always result in the conclusion that a disparate impact claim was not exhausted since in most cases, a charging party is not educated regarding the evidentiary basis for establishing discrimination under either theory.

While the evidentiary burdens for establishing disparate treatment claims and disparate impact claims are clearly established, these burdens are not common knowledge among the general public and should not be the basis for evaluating a charge of discrimination. A charging party unfamiliar with the law and unrepresented by counsel will not know what information is required to be included in a charge of discrimination. While in some cases, unrepresented charging parties may in fact include information regarding an employment practice or policy in the charge, requiring a charging party to set forth facts which relate to the evidentiary burdens of a Title VII case pursued in the courts is simply too onerous a burden.

A compelling analysis exists in this context. There is a recognized difference between the legal requirements for pleading an employment discrimination case and the evidentiary burdens of proof to establish a claim of discrimination on the merits. An employment discrimination

complaint need only contain "a short and plain statement of the claims showing that the pleader is entitled to relief." See Fed.R.Civ. Proc. 8(a)(2). See also Swierkiewicz v. Sorema, 534 U.S. 506, 512, 122 S.Ct. 992, 998 (2002) where this court stated that "imposing a heightened pleading standard in employment discrimination cases conflicts with Rule 8(a)(2) which provides that a complaint must include 'only a short and plain statement of the claim showing that the pleader is entitled to relief.' A pleading is sufficient if it gives the defendant fair notice of what the Plaintiff claims and the ground upon which those claims rest since simplified pleading requirements rely on liberal discovery rules and summary judgment practice to define facts and issues."

In the context of an employment discrimination complaint alleging disparate impact, a pleading is sufficient if it gives the defendant fair notice of the claims and the grounds upon which those claims rest. A complaint must only include a short and plain statement of the claim showing the plaintiff is entitled to relief. Under this analysis, a plaintiff is not required to **plead** the employment policy or practice that is alleged to have caused a disparate impact despite that the policy or practice must be identified in the course of litigation as an essential element of proof of the ultimate fact.

Given the liberal pleading requirements of rule 8, and this court's Swierkiewicz decision, the sufficiency of a charge of discrimination must necessarily be evaluated on a significantly different basis. Since legal counsel are not held to a heightened pleading requirement in employment discrimination cases, then most certainly unrepresented employees who believe they have been discriminated against, but who are unfamiliar with the legal bases for pursuing discrimination claims, should not be held to a heightened standard with respect to the information contained in the charge of discrimination.

This is especially true since unlawful discrimination can be established in one of two ways; by proof of intentional discrimination under the established burden shifting analysis, or by statistical proof that a neutral employment policy or practice has an unintentional discriminatory effect. The basis of disparate treatment and disparate impact claims is the same i.e. prohibited discrimination, it is only the proof and evidentiary burdens that are different. Consequently a charge of discrimination can be fairly said to include either theory of discrimination regardless of whether a particular employment policy or practice is identified by the charging party. A disparate impact claim is not so different from a disparate treatment claim so as to place them is completely separate categories for purposes of the exhaustion requirement as would be the case if a party believed the basis of some adverse employment action was the result of retaliation as opposed to discrimination.

Given the decisions of those courts that have addressed this issue, and the apparent trend in the courts of requiring charging parties to identify an employment policy or practice in the charge of discrimination as a condition of exhaustion of administrative remedies, a writ of certiorari should issue to review the decision of the of the court of appeals for the Fifth Circuit.

Is the Exhaustion of Administrative Remedies Requirement a Jurisdictional Prerequisite or a condition precedent subject to waiver, estoppel, and equitable tolling?

Pacheco's disparate impact claim was dismissed by the district court pursuant to Fed. R. Civ. Proc. 12(b)(1) for lack of subject matter jurisdiction because the court found he had not exhausted his administrative remedies regarding that claim. The Fifth Circuit court of appeals affirmed dismissal on this basis, but at footnote 7 recognized a split in Fifth Circuit court

of appeals decisions regarding the issue of whether the exhaustion of -administrative remedies requirement for employment discrimination cases was a jurisdictional prerequisite or a condition precedent subject to waiver and estoppel. (App 13-15) The court elected not to take sides in the dispute, and affirmed dismissal on the basis of lack of subject matter jurisdiction.

The court observed that EEO and EEOC filing deadlines are not jurisdictional under this court's holdings in Zipes, et al v. Trans World Airlines, Inc., 455 U.S. 385 (1982) and Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) but held that neither this court nor the Fifth Circuit sitting en banc had ruled that the exhaustion requirement is subject to waiver and estoppel.

In 1982 this court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." See Zipes, et al v. Trans World Airlines, Inc., 455 U.S. 385 (1982). This court observed that the provisions of 42 U.S.C. 2000e-5(e) and (f) don't limit jurisdiction to cases in which there has been a timely filing with the EEOC, and that the provisions applicable to the time for filing charges with the EEOC is not stated in jurisdictional terms. Zipes applied to suits against private employers, and in 1990 the Supreme Court extended the same principles of waiver, estoppel and equitable tolling to suits against the government. See Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990).

The enforcement provisions of 42 U.S.C. 2000e-5 include references to filing charges of discrimination. 42 U.S.C. 2000e-5(b) provides in relevant part:

"Whenever a charge is filed by or on behalf of a person claiming to be aggrieved,... alleging that an employer ... has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer... within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires."

42 U.S.C. 2000e- 5(e) provides in part:

"a charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter...."

Just as there is no language in the statute to indicate that timely filing a charge is jurisdictional, there is similarly no language in the statute to suggest that filing a charge is jurisdictional. The only language that references filing a charge is clearly not jurisdictional, i.e. "Whenever a charge is filed..." and "a charge...shall be filed within one hundred eighty days..." The time to file is stated in mandatory language "shall" but this court has held that the time requirement is a not jurisdictional but like a statute of limitations subject to waiver, estoppel and equitable tolling. See Zipes, 455 U.S. 385 (1982) and Irwin, 498 U.S. 89 (1990).

There is no basis for concluding that filing a charge of discrimination in the first instance, as compared to filing a charge within the time period specified in 42 U.S.C. 2000e- 5(e) is jurisdictional. Dismissal of Pacheco's disparate impact claim

on the basis that failure to exhaust is a jurisdictional requirement is contrary to the express language of the statute.

CONCLUSION

For the stated reasons, a writ of certiorari should issue to review the opinion of the court of appeals for the Fifth Circuit and to answer important questions of federal law that should be, but have not been settled by this court.

Respectfully submitted this the 4 day of August, 2006.

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APPENDIX

United States Court of Appeals
Fifth Circuit
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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 04-51160 & 05-50129

CARLOS PACHECO,

Plaintiff-Appellant,

versus

NORMAN Y. MINETA, ETC., ET AL.,

Defendants,

NORMAN Y. MINETA, SECRETARY, DEPARTMENT OF TRANSPORTATION, Federal Aviation Administration,

Defendant-Appellee.

CARLOS PACHECO,

Plaintiff-Appellee,

versus

NORMAN Y. MINETA, ETC., ET AL.,

Defendants,

NORMAN Y. MINETA, SECRETARY, DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

Before GARWOOD, PRADO, and OWEN, Circuit Judges.

GARWOOD, Circuit Judge:

Appellant Carlos Pacheco filed this suit against Norman Mineta, the Secretary of the United States Department of Transportation, pursuant to Title VII of the Civil Rights Act of 1964, section 717(c), 42 U.S.C. § 2000e-16(c). Pacheco alleged both disparate-treatment and disparate-impact discrimination. The district court entered summary judgement against Pacheco on his disparate-treatment claim, dismissing that claim with prejudice. The court dismissed Pacheco's disparate-impact claim for lack of subject-matter jurisdiction, pursuant to Rule 12(b)(1), citing his failure to exhaust his administrative remedies. Pacheco appeals only the second ruling, challenging the district court's dismissal for failure to exhaust administrative remedies. The government cross appeals the district court's failure to award it costs pursuant to Rule 54(d)(1). We affirm the district court's 12(b)(1) dismissal and we vacate and remand the district court's ruling with respect to costs.

FACTS AND PROCEEDINGS BELOW

Carlos Pacheco is an Air Traffic Controller Specialist with the Federal Aviation Administration ("FAA") in Corpus Christi, Texas. In December 1999, the Corpus Christi Air Tower announced a supervisor-level vacancy. Pacheco applied, but was ultimately passed over for promotion by a less-experienced applicant.

Air Traffic employees who have bid on a vacancy are subject to a two step selection process. In the first step, a human resources personnel specialist from the Federal Aviation Administration (FAA) Human Resource Management Division (HRMD) determines which of the candidates is qualified for the position, and submits the names of the qualified candidates to the selecting official, which in this case was the Corpus Christi Facility manager, Warren Meehan. In this case, HRMD forwarded seven names,

including Pacheco's, to Meehan. In the second step, the selecting official chooses among the candidates referred to him or her by HRMD.

Warren Meehan had recently implemented a promotion system based, not on years of experience, but on twenty-three specified employee attributes, such as initiative, loyalty and integrity. The idea for this system came to him while at a 1999 manager's conference, at which the FAA Regional Manager had described the twenty-three employee attributes that he deemed important in future FAA leaders. Upon his return from the conference, Meehan decided that all future promotions at Corpus Christi would consider these factors.

Meehan's new system was used for the first time in February 2000, for the Operations Supervisor December 1999 vacancy at the Corpus Christi air tower, the promotion that is the subject of Pacheco's suit. [1] The supervisors of all seven employee candidates whose names had been forwarded by HRMD were interviewed and asked to rate their supervisee, on a scale of one to ten, in each of these twenty-three attributes. The supervisor interviews were conducted by a three-member panel, which included a Hispanic FAA employee from outside the facility. After the interview results were compiled, the panel reported them to Warren Meehan, who made the final employment decision. Pacheco, who was ranked sixth out the seven employees, was notified on February 28, 2000 that he did not get the promotion.

Pacheco timely contacted an equal opportunity counselor, alleging that he was passed over for promotion on

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[1] Since then Meehan's new system was used only on one other occasion.

the basis of his race.[2] Unsatisfied with the counselor's advice, Pacheco timely filed a formal administrative complaint on April 29, 2000 with the Equal Opportunity Office (EEO) of his employer, the Department of Transportation (DOT).[3] On June 2, 2000, the DOT's Office of Civil Rights notified Pacheco by mail that it was accepting the following claim for investigation: "Whether the FAA treated you differently, based on your national origin (Hispanic), when you were not selected for a supervisor's job on February 28, 2000." The letter notified Pacheco that if he objected to the way his claim was stated, he

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A federal employee who is alleging unlawful discrimination on the basis of race must contact a counselor within 45 calendar days of the alleged discriminatory action, or, in the case of a personnel action, within 45 calendar days of the effective date of the action, before they may file a formal administrative charge with their agency's Equal Opportunity Office. *See* 42 U.S.C. § 2000e-16; 29 C.F.R. § 1614.105 .

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In this administrative charge, Pacheco asserts that he was discriminated against because of his race, Hispanic, and that

> "[t]he latest incident [on 2/28/2000]was non-selection for a supervisor's job opening at this facility. Once again, the 'good old boy' was selected even though I was more qualified having been with the agency since 1978. This being my seventh facility (my third level 4 facility). The incident before this occurred the summer of 1999 when I had a bid at Orlando in the Southern Region. I was told by the chief that the Southern Region doesn't pick out of region. Three months later, a white controller from our facility was picked up for Atlanta (in the Southern Region). This person hadn't been here two years with the FAA. I asked the chief about the aforesaid policy, he had no comment. An incident before this occurred in 1998, someone defaced a picture of my son on my mail tray (no others were touched). I presented the incident to the chief who in turn told me he would write me a formal letter of apology. It must have slipped his mind because I have yet to receive it."

should contact the Office within five days. Pacheco did not respond.

Unsatisfied with the EEO's resolution of his complaint, Pacheco filed this suit in the court below on November 14, 2002, against Norman Mineta, Secretary of the DOT, pursuant to Title VII of the Civil Rights Act of 1964, section 717(c).[4] Pacheco's suit alleges both disparate-treatment discrimination and disparate-impact discrimination.[5] The district court

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Only the Title VII claims against Secretary Mineta are at issue here. However, the Title VII claims were not the only claims brought by Pacheco in this suit, nor is Secretary Mineta the only party he sued. Pacheco's original complaint named Secretary Mineta as a defendant for Title VII discrimination and for the depravation of his First Amendment and Equal Protection rights under the color of law, pursuant to § 1983. Pacheco then amended his complaint to add as a defendant the manager of the Corpus Christi facility in which he worked, Warren Meehan. Pacheco then amended his complaint for a second time, specifying that he was suing Secretary Mineta, in his official capacity, under Title VII and was suing Warran Meehan, in his individual capacity, under § 1983. After the government reminded Pacheco's attorney that § 1983 applies to state, not federal, officials, Pacheco asked the district court for leave to file a third amended complaint, replacing references to "section 1983" with "section 1981." Citing Federal Rule of Civil Procedure 15(a), the court noted that such an amendment would be "futile" because Pacheco's exclusive remedy for employment discrimination lies under Title VII, against Secretary Mineta in his official capacity. The court then dismissed with prejudice all claims against Warren Meehan, a ruling that Pacheco does not appeal.

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Pacheco's disparate impact allegations are wholly conclusional. His second amended (and final) complaint merely alleges: "The application and selection process utilized by the Defendant disparately impacts Plaintiff in that Hispanic applicants in the Southwest Region of the Federal Aviation Administration are disproportionately not selected for supervisory and management positions as compared to Anglo applicants." There is no suggestion of in what manner the process operated so as to disadvantage Hispanics nor is there identified any particular feature or aspect of the process which allegedly had such an effect on Hispanics generally or on

entered summary judgment against Pacheco on his disparate-treatment claim, and dismissed Pacheco's disparate-impact claim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The court held that Pacheco had failed to exhaust his administrative remedy before the EEO with respect to his disparate-impact claim. Pacheco does not appeal the summary judgment dismissal of his disparate-treatment claim. His only issue before this court is whether he exhausted his administrative remedies with respect to his disparate-impact claim.

Despite the DOT's summary judgment victory, the district court, without explanation, ordered that each party bear its own costs pursuant to Rule 54(d)(1). FED.R.CIV.P. 15(d)(1). The DOT filed a motion for a new trial and to amend judgment on the ground that the court erred in denying an award of costs to the prevailing party without any explanation. The district court then ruled that the losing party "brought this action in good faith" and accordingly denied the DOT's motion. The DOT has cross-appealed on the issue of costs.

DISCUSSION

I. Exhaustion of the Disparate-Impact Claim

Pacheco appeals the district court's Rule 12(b)(1) dismissal of his disparate-impact claim, arguing that he did, in fact, exhaust his administrative remedies before the EEO. Because we find that the scope of Pacheco's administrative charge is too narrow to have exhausted a claim for disparate-impact discrimination, we affirm.

A. Disparate Impact versus Disparate Treatment

Title VII creates a federal cause of action for two largely separate theories of discrimination, disparate treatment and

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Pacheco in particular; nor does the complaint even allege what the application and selection process consists of.

disparate impact. *International Brotherhood of Teamsters v. United States*, 97 S.Ct. 1843, 1854 n.15 (1977). Disparate-treatment discrimination addresses employment actions that treat an employee worse than others based on the employee's race, color, religion, sex, or national origin. In such disparate-treatment cases, proof and finding of discriminatory motive is required. *Id.*

Disparate-impact discrimination, on the other hand, addresses employment practices or policies that are facially neutral in their treatment of these protected groups, but, in fact, have a disproportionately adverse effect on such a protected group. *Hebert v. Monsanto*, 682 F.2d 1111, 1116 (5th Cir. 1982). In disparate-impact cases, proof or finding of discriminatory motive is not required. *Id.* The defendant, however, can rebut a prima facie showing of disparate impact by proving that the challenged policy is a business necessity. *Griggs v. Duke Power Co.*, 91 S.Ct. 849, 853–54, (1973).

B. The Exhaustion Requirement

Section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c), permits most federal employees to seek relief from proscribed discriminatory employment practices in Federal District Court. As a precondition to seeking this judicial relief, however, complaining employees must exhaust their administrative remedies by filing a charge of discrimination with the EEO division of their agency.[6] *Brown v. General Servs.*

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[6] Instead of the EEO, private sector employees must file an administrative charge with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-(5)(b) (2005). Because the presently relevant scope of the exhaustion requirement is the same for both federal and private employees, we freely cite to both federal and private-sector employment-discrimination cases here. *See Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995) (treating the scope-of-investigation question the same for both private and public employees).

Admin., 96 S.Ct. 1961, 1967-68 (1976); *Martinez v. Dep't. of U.S. Army*, 317 F.3d 511 (5th Cir. 2003); 29 C.F.R. § 1614.105-107 (2005). We review *de novo* a district court's determination of whether the exhaustion requirement is satisfied.[7] *Martinez*, 317 F.3d at 512; *Randel v. Dep't. of U.S. Navy*, 157 F.3d 392, 395 (5th Cir. 1998).

The scope of the exhaustion requirement has been defined in light of two competing Title VII policies that it furthers. On the one hand, because "the provisions of Title VII

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There is disagreement in this circuit on whether a Title-VII prerequisite, such as exhaustion, is merely a prerequisite to suit, and thus subject to waiver and estoppel, or whether it is a requirement that implicates subject matter jurisdiction. The Supreme Court has held that the EEOC or EEO *filing deadlines* are not jurisdictional. *Zipes v. Trans World Airlines, Inc.*, 102 S.Ct. 1127, 1133(1982); *Irwin v. Dep't of Veterans Affairs*, 111 S.Ct. 453, 457-58 (1990). *See also Coke v. Gen. Adjustment Bureau*, 640 F.2d 584 (5th Cir. 1981) (*en banc*); *Henderson v. United States Veterans Admin.*, 790 F.2d 436, 440 (5th Cir. 1986). However, the reasoning in *Zipes*, which cites our *en banc* holding in *Coke* with approval, relies heavily on legislative history and Supreme Court precedents that characterize the filing deadlines as statutes of limitations. *See, e.g., Henderson v. U.S. Veterans Admin.*, 790 F.2d 436, 440 (5th Cir. 1986) ("The filing deadlines are in the nature of statutes of limitations which are subject to waiver, estoppel, and equitable tolling."). Neither the Supreme Court nor this court sitting *en banc* has ruled that the *exhaustion* requirement is subject to waiver or estoppel, and our panels are in disagreement over that question. *Compare Tolbert v. United States*, 916 F.2d 245, 247 (5th Cir. 1990) ("[I]t is the well-settled law of this circuit that each [Title VII] requirement is a prerequisite to federal subject matter jurisdiction.") *and Porter v. Adams*, 639 F.2d 273, 276 (5th Cir. 1981) ("The exhaustion requirement ... is an absolute prerequisite to suit") *and Randel v. Dep't. of U.S. Navy*, 157 F.3d 392, 395 (5th Cir. 1998) ("If the claimant fails to comply with either of these [Title VII] requirements then the court is deprived of jurisdiction over the case.") *with Young v. City of Houston, Tex.*, 906 F.2d 177, 180 (5th Cir. 1990) ("A failure of the EEOC prerequisite does not rob a court of jurisdiction.") *and Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 449 (5th Cir. 1983) ("The basic two statutory requirements (although these are not necessarily "jurisdictional") for a Title VII suit are . . ."). Because neither party has a winning waiver or estoppel argument, we need not take sides in this dispute.

were not designed for the sophisticated," and because most complaints are initiated pro se, the scope of an EEOC complaint should be construed liberally. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970); *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 451 (5th Cir. 1983).[8] On the other hand, a primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC, in attempt to achieve non-judicial resolution of employment discrimination claims. *Id.* at 466. Indeed, "[a] *less* exacting rule would also circumvent the statutory scheme, since Title VII clearly contemplates that no issue will be the subject of a civil action until the EEOC has first had the opportunity to attempt to obtain voluntary compliance." *Sanchez*, 431 F.2d at 467. *See also Ong v. Cleland*, 642 F.2d 316, 319 (9th Cir.1981) ("[a]llowing a federal court complaint to proceed despite its loose 'fit' with the administrative charge and investigation . . . is precluded if it would circumvent . . . agency efforts to secure voluntary compliance before a civil action is instituted."). With that balance in mind, this court interprets what is properly embraced in review of a Title-VII claim somewhat broadly, not solely by the scope of the administrative charge itself, but by the scope of the EEOC investigation which "can reasonably be expected to grow out of the charge of discrimination." *Sanchez*, 431 F.2d at 466. We engage in fact-intensive analysis of the statement given by the plaintiff in the administrative charge, and look slightly beyond its four corners, to its substance rather than its label. *Fellows*, 701 F.2d at 451; *Fine v. GAF Chemical Corp.*, 995 F.2d 576, 578

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See also Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969) ("an individual drafting his charge as best he can without expert legal advice . . . a single, poor ignorant employee with a grievance, not a sling shot in his hand, faces a huge industrial employer in this modern day David and Goliath confrontation.") (Brown, C.J.).

(5th Cir. 1993); *Ong*, 642 F.2d at 319.[9]

So, for example, in *Fellows*, this court held that an entire *class* of plaintiffs had exhausted their administrative remedies, even though the administrative charge complained only of *individual* discrimination. *Fellows*, 701 F.2d at 447. *See also Sanchez*, 431 F.2d 455 (same). Later, in *Gamble v. Birmingham Southern Railroad Co.*, this court held that black railroad workers who had filed an administrative charge complaining of discrimination in promotions to *conductor* had also exhausted their administrative remedies with respect to claims of discrimination in promotions to *higher supervisory positions*. 514 F.2d 678 (5th Cir. 1975).

On the other hand, in *Fine v. GAF Chemical Corp.*, this court held that a plaintiff's administrative remedies were *not* exhausted with respect to an incident of sexual discrimination because the incident sued upon was separate from the one raised in her administrative charge. 995 F.2d 576, 577-78 (5th Cir. 1993). And, in *Young v. City of Houston*, this court held that a sex discrimination claim had not been exhausted by the plaintiff's charge of race and age discrimination. 906 F.2d 177 (5th Cir. 1990).

This court has not faced a question on appeal like Pacheco's: whether a disparate-impact claim was exhausted by

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[9] The administrative charge is construed "liberally," *see Fellows*, 701 F.2d at 451, but, at least for the most part, the desired liberality is achieved by application of the rule that courts will look beyond the scope of the charge's language to the scope of the EEO investigation which can reasonably be expected to grow out of the charge. Furthermore, this liberal construction applies even in cases brought against the federal government, despite the Supreme Court's admonition that Title VII's conditions on the waiver of sovereign immunity be strictly construed. *Compare Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986) (holding that Title VII conditions on waiver must be strictly construed); *with Irwin v. Dep't of Veteran Affairs*, 111 S.Ct. 453, 457 (1990) ("[W]e must be careful not to assume the authority to narrow the waiver that Congress intended . . . .") (citation omitted).

the plaintiff's administrative charge.[10] Thus, we have yet to consider what facts in an administrative charge might be reasonably expected to trigger an EEO disparate-impact investigation. However, other circuits, as well as some federal district courts, have addressed the question.

For example, in *Grace v. Bank of America*, Judge Fitzwater ruled that a plaintiff who filed an administrative charge of a race-based firing did not exhaust her disparate-impact claim. *Grace v. Bank of America*, No. Civ. A. 303CV 1294D, 2003 WL 23095993 (N.D. Tex. Dec. 23, 2003). In *Grace*, the plaintiff had filed an administrative charge asserting that the bank discriminated against her by terminating her employment. In dismissing the plaintiff's disparate-impact claim, the court explained that "a claim for disparate impact is not 'like or related to' the plaintiff's EEOC charge nor could it reasonably be expected to grow out of [it]." *Id.*

Judge Cote in the Southern District of New York issued a similar ruling in *Woodman v. WWOR-TV*, holding that the plaintiff's administrative charge could be reasonably expected to lead only to an investigation of age-based disparate treatment, not age-related disparate impact. *Woodman v. WWOR-TV*, 293 F. Supp. 2d 381, 390 (S.D.N.Y. 2003). In that case, the plaintiff had filed an age-discrimination charge with the EEO alleging that:

> "[A]ll of my nine colleagues at BHC/WWOR who were fired, except two, were over the age of 40. On the other hand, my counterpart in Los Angeles, who is much younger, was not fired. It seems, therefore, that

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[10] The only exception is that we addressed this question in one unpublished opinion. *Stith v. Perot Systems Corp.*, 122 Fed. Appx. 115 (5th Cir. 2005). However, because of the fact-intensive nature of this analysis, *Stith*'s reasoning is too conclusory to be helpful here.

> age was a motivating factor in my employment termination."

Woodman, 293 F. Supp. 2d at 390. The court held that it was not enough for the plaintiff to have alleged that other colleagues were affected because she had failed to "identify a specific, facially neutral employment practice." *Id.* Furthermore, the court reasoned that the plaintiff's administrative charge had complained of *intentional* age discrimination, a crucial element in a disparate-treatment claim that is unnecessary in a disparate-impact claim. *Id.*

In *Gomes v. Avco*, the Second Circuit held that the plaintiff's administrative charge had exhausted both a claim for disparate-treatment and disparate-impact discrimination. 964 F.2d 1330, 1335 (2d Cir. 1992). There, plaintiff's administrative charge stated he was passed over for promotion because of his Portuguese ancestry. He alleged that (1) he applied for a promotion; (2) such promotions are governed by an "eight-years experience" rule; (3) he arguably met this eight-year experience requirement; (4) the promotion was given to someone less qualified; and (5) he was the only Portuguese employee in his job classification.

The court held that "[t]o be sure, this complaint most naturally supports a claim of intentional discrimination . . . nonetheless, once the EEOC investigated the case and found that [the plaintiff] did not satisfy the eight year rule, it would have been perfectly natural for the EEOC to question the necessity of the eight year rule itself." *Id.* at 1334. The court reasoned that the plaintiff's allegation that he was the only Portuguese employee in his job classification would reasonably lead the EEOC to consider disparate impact. *Id.* Furthermore, the allegation that less-qualified people were promoted ahead of him might lead the EEOC to question the business justification for such a rule. *Id.* But most importantly,

unlike *Grace* or *Woodman*, the plaintiff in *Gomes* had identified a facially neutral employment policy (the eight-year rule) that provided a foundation for an EEO disparate-impact investigation. The court recognized that the eight-year rule would have put the EEO on notice of a possible disparate-impact claim, thus "an investigation of [the plaintiff's] disparate impact claim would reasonably have flowed from an investigation of his disparate treatment claim." *Id.* at 1335.

C. Pacheco's Administrative Charge

Pacheco's administrative charge (see note 3, *supra*) lists three incidents of discrimination:

> (1) "The [February 28, 2000] incident was non-selection for a supervisor's job opening at this facility. Once again, the "good old boy" was selected even though I was more qualified having been in the agency since 1978. This being my seventh facility (my third level 4 facility)."
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> (2) "The incident before this occurred the summer of 1999 when I had a bid at Orlando in the Southern Region. I was told by the Chief that the Southern Region doesn't pick out of region. Three months later a white controller from our facility was picked up for Atlanta(in the Southern Region). This person hadn't been here two years with the FAA. I asked the Chief about the aforesaid policy, he had no comment."
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> (3) "An incident before this occurred in 1998, someone defaced a picture of my son on my mail tray (no others were touched). I presented the incident to the Chief who in turn told me he would write me a formal letter of apology. It must have slipped his mind because I have yet to receive it."

Only the first incident was accepted for investigation

by the EEOC. The second and third were rejected as time-barred.[11] These two incidents (which are not the subject of the instant suit) are relevant only to the extent that they provide context to the first.

In reviewing the first incident, the question is whether a disparate-impact investigation might reasonably be expected to grow out of the facts that Pacheco did allege. In deciding this question, a review of the prima facie case for disparate impact is relevant. A disparate-impact plaintiff must show (1) a facially neutral policy; (2) that, in fact, has a disproportionately adverse effect on a protected class. *Hebert*, 682 F.2d at 1116. Furthermore, proof of discriminatory motive is not required for disparate-impact claims. *Id.*

On its face, Pacheco's administrative charge alleges none of the elements of disparate impact. Instead, it is facially a disparate-treatment claim, like those in *Grace* and *Woodman*, alleging that he was singled out for intentional discrimination because of his race. Pacheco complained that he was passed over for promotion in favor of a "good old boy."[12] As the

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According to Pacheco, the two earlier incidents occurred in the Summer of 1999 and in 1998. His formal complaint with the EEO is dated April 29, 2000. Generally, discrimination claims alleging conduct that occurred more than 45 days before the initiation of administrative action (contacting an EEO counselor) are time barred in a subsequent action in federal court. 42 U.S.C. § 2000e-16; 29 C.F.R. § 1614.105. Furthermore, if the complaint remains unresolved after counseling, the employee must file a formal complaint with the EEO within 15 days of the last counseling session. 29 C.F.R. § 1614.105(b); 29 C.F.R. § 1614.106(d).

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Pacheco's deposition testimony makes clear that his is a complaint about intentional discrimination by his third-level supervisor, Warren Meehan. When pressed for examples of this discrimination, Pacheco said, "[I]t was just the way he acted around me . . . I was just somebody that just happened to be there and that he just had to contend with basically." Pacheco also

district court below noted, this complaint "clearly supports claims for unfair and intentional discrimination, but does not even suggest claims under a disparate impact theory."

In particular, we note that Pacheco's administrative charge fails to identify any neutral employment policy that would form the basis of a disparate-impact claim. *See Gomes*, 964 F.2d 1330, 1335. A neutral employment policy is the cornerstone of any EEO disparate-impact investigation, since the EEO must evaluate both the policy's effects on protected classes and any business justifications for the policy.

Finally, we note that all three incidents mentioned in Pacheco's administrative charge are examples of disparate-treatment discrimination. The two earlier incidents, where Pacheco was allegedly lied to about the Southern Region's hiring policy and allegedly harassed by a co-worker who defaced a picture of his son, though time barred, provide a context for understanding Pacheco's latest allegation. In his administrative charge, Pacheco himself links all three incidents, suggesting that they were part of a larger pattern of *intentional* discrimination *against him* by the manager of the FAA's Corpus Christi facility.

To be clear, we do not require that a Title-VII plaintiff check a certain box[13] or recite a specific incantation to exhaust his or her administrative remedies before the proper agency.

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remembered a racist joke that was told to him by Mr. Meehan on a golf course.

Pacheco's deposition also reflects that it was Meehan who allegedly mislead him in 1999 by falsely telling him that the Southern Region "doesn't pick out of region" as asserted in this administrative charge.

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Sanchez v. Standard Brands, Inc., 431 F.2d 455, 463 (5th Cir. 1970) ("In the context of Title VII, no one—not even the unschooled—should be boxed out").

See Sanchez, 431 F.2d at 463-65. Nor do we require, for purposes of exhaustion, that a plaintiff allege a prima face case before the EEOC. *See Id.* Instead, the plaintiff's administrative charge will be read somewhat broadly, in a fact-specific inquiry into what EEOC investigations it can reasonably be expected to trigger.

In this case, we hold that a disparate-impact investigation could not reasonably have been expected to grow out of Pacheco's administrative charge because of the following matters taken together: (1) it facially alleged disparate treatment; (2) it identified no neutral employment policy; and (3) it complained of past incidents of disparate treatment only.[14] Accordingly, we affirm the district court's 12(b)(1) dismissal of Pacheco's disparate-impact claim.

II. Discovery

Because we hold that Pacheco did not exhaust his administrative remedies with respect to his disparate-impact claim, we need not decide whether, as Pacheco contends, the district court abused its discretion by denying Pacheco certain discovery on that claim. Nevertheless, we note that the record indicates no such abuse of discretion. *Atkinson v. Denton Pub. Co.*, 84 F.3d 144, 147-48 (5th Cir. 1996) (reviewing for abuse of discretion); *Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1012 (5th Cir. 1986) (declining to reverse trial court's "discovery rulings" unless they are "arbitrary or clearly unreasonable").

Not until this suit has Pacheco finally alleged, albeit in only the most conclusory fashion, disparate-impact discrimination. His complaint alleges that he was the victim

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Moreover, this is also supported by Pacheco's statement on the charge form that "I want to leave this hostile work environment. A paid transfer to a facility of my choice, either Orlando, Tampa, Pensacola or Jacksonville", and by Pacheco's never having questioned DOT's reasonable interpretation of the charge as being only one of disparate treatment.

not only of intentional discrimination but also of a facially-neutral promotion "application and selection process" with an adverse impact on Hispanics.[15]

Pacheco was eliminated in the new configuration of the second stage of the selection process which was used for the first time in February 2000 in the promotion to fill the Corpus Christi Operations Supervisor vacancy which Pacheco was denied. According to Meehan's affidavit, the process has been used only one other time since, and there is no contrary evidence. Despite this, Pacheco's interrogatory requested the identity "of all persons who have been selected or promoted into a supervisory or management position in the southwest region of the FAA between 1995 and the present . . . [including] their race and national origin."

The information sought through this interrogatory would have been of limited relevance to Pacheco's suit. Pacheco requested the discovery of FAA employee-promotion data dating back to 1995, five years before the policy of which he apparently complains was implemented. More importantly, Pacheco requested this data for the entire Southwest region,[16] even though he never alleged discrimination by anyone but

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Pacheco also introduced a newspaper article from the San Antonio Express News reporting a Department of Labor study that acknowledged a statistical underrepresentation of Hispanics in Federal Agencies. This article is not relevant to the exhaustion question because it was not submitted to the EEO, but was produced by Pacheco, after suit was filed in district court, in response to discovery requests. Further, the study has only the very slightest relevance to Pacheco's disparate-impact claim, since it reported underrepresentation in employment, not promotions, and was a survey of the *entire executive branch* as a whole, not merely the FAA or its Southwest Division.

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The Southwest region comprises 480 facilities in Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.

the Manager of the FAA's Corpus Christi facility.[17] Accordingly, even if Pacheco had exhausted his administrative remedies with respect to his disparate-impact claim, we would decline to hold that the district court abused its discretion by denying Pacheco such broad, and largely irrelevant, discovery. *See, e.g., Atkinson,* 84 F.3d at 147 (holding, in an age discrimination suit, that the district court did not abuse its discretion by denying discovery of past employee records because there was no nexus between the plaintiff's claim and the records that the plaintiff sought); *Conboy v. Edward D. Jones & Co.,* L.P., 140 Fed.Appx. 510, 516 (5th Cir. 2005) (unpublished).

II. Cross Appeal on Rule 54(d)

The DOT argues that, as a matter of law, the good faith of the plaintiff is, by itself, an insufficient reason to defeat the cost-shifting provision in Rule 54(d). This question is a matter of first impression in this court, but all circuits that have expressly considered the question agree with the DOT's position.

Rule 54(d)(1) of the Federal Rules of Civil Procedure provides that "costs, other than attorneys' fees shall be allowed as of course to the prevailing party unless the district court otherwise directs...." FED.R.CIV.P. 54(d)(1). Because the Rule authorizes the district court to deny the award, we review that exercise of authority for abuse of discretion. *Schwarz v. Folloder,* 767 F.2d 125, 131 (5th Cir.1985). Only when a clear abuse of discretion is shown can an award of cost be overturned. *Kinnear-Weed Corp. v. Humble Oil and Refining Co.,* 441 F.2d 631, 637 (5th Cir.1971).

However, Rule 54(d)(1) contains a strong presumption

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The FAA responded to Pacheco's discovery requests with an affidavit, objecting that the production of this information for the last eight years would be unduly burdensome.

that the prevailing party will be awarded costs. *Schwarz*, 767 F.2d at 131. Indeed, this court has held that "the prevailing party is prima facie entitled to costs," and has described the denial of costs as "in the nature of a penalty." *Schwarz*, 767 F.2d at 131. As a result of this cost-shifting presumption, the general discretion conferred by Rule 54(d)(1) has been circumscribed by the judicially-created condition that a court "may neither deny nor reduce a prevailing party's request for cost without first articulating some good reason for doing so." *Schwarz*, 767 F.2d at 131 (citation omitted); *cf. Delta Air Lines, Inc. v. August*, 101 S.Ct. 1146, 1151 n.14 (1981) (assuming that costs are denied to the prevailing party "only when there would be an element of injustice in a cost award").

The Fifth Circuit has little case law addressing this issue, but in other circuits, "[a] wide range of reasons have been invoked to justify withholding costs from the prevailing party." 10 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2668, at 234 (1998). Among these are: (1) the losing party's limited financial resources; (2) misconduct by the prevailing party; (3) close and difficult legal issues presented; (4) substantial benefit conferred to the public; and (5) the prevailing party's enormous financial resources.[18] *Id.* And, according to Wright and Miller, courts also deny costs if "the losing party prosecuted the action in good faith." *Id.* at 238. However, every case cited by Wright and Miller for this proposition denies costs on the basis of *both* the losing party's good faith *and* some other one or more of the factors listed above.

Every circuit to expressly address the question in a published opinion—the Fourth, Sixth, Seventh, Ninth and Tenth—has ruled that good faith, by itself, cannot defeat the operation of Rule 54(d)(1). *Teague v. Bakker*, 35 F.3d 978, 996

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[18] These reasons are enumerated only for the purpose of exposition. We do not decide whether any of these is a sufficient reason to deny costs.

(4th Cir. 1994) ("[T]he mere fact that a suit may have been brought in good faith is alone insufficient to warrant a denial of costs in favor of a prevailing defendant"); *Cherry v. Champion*, 186 F.3d 442, 446 (4th Cir. 1999) ("[A] party's good faith, standing alone, is an insufficient basis for refusing to assess costs against that party."); *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 731 (6th Cir. 1986) ("Good faith without more, however, is an insufficient basis for denying costs to a prevailing party"); *Coyne-Delany v. Capital Development Board of Illinois*, 717 F.2d 385, 390 (7th Cir. 1983) ("The losing party's good faith and proper conduct of the litigation is not enough...."); *National Information Services, Inc. v. TRW, Inc.*, 51 F.3d 1470, 1472-73 (9th Cir. 1995), *overruled on other grounds by Association of Mexican-American Educators v. State of California*, 231 F.3d 572, 593 (9th Cir. 2000) (*en banc*) (overruling National Information Systems but only to the extent it held that "*only* misconduct may support the denial of costs to a prevailing party"); *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1527 (10th Cir. 1997).

Here, even though the DOT was in all respects the prevailing party, it has been denied costs by the district court.[19] When the government pressed the court for a reason, which it was required to give, the district court replied: "It is clear that Plaintiff brought this action in good faith. He is represented by an excellent lawyer who litigates in good faith. Under such circumstances, each party should bear its own costs."

Following our sister circuits, we hold that the losing

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A dismissal with prejudice is tantamount to a judgment on the merits and thus the prevailing party is entitled to costs. *Schwarz*, 767 F.2d at 130-31. Furthermore, this court has held that the more stringent *Christiansburg* standard, which used to determine whether a defendant is a prevailing party for the purpose of awarding *attorneys' fees* under Title VII, does not apply to an award of costs. *Lewis v. NLRB*, 750 F.2d 1266, 1279 (5th Cir. 1985).

party's good faith is alone insufficient to justify the denial of costs to the prevailing party. All federal litigants, including this plaintiff, have an obligation to bring suit in good faith. FED.R.CIV.P. 11; WESTERN DISTRICT OF TEXAS LOCAL RULE AT-4, STANDARDS OF PROFESSIONAL CONDUCT (adopting the standards of professional conduct of the State Bar of Texas, including Rule 3.01, which requires attorneys to bring suits in good faith). As the Ninth Circuit has said, "It follows that noble intentions alone do not relieve an unsuccessful litigant of the obligation under Rule 54(d) to compensate his opponent for reasonable costs. 'If the awarding of costs could be thwarted every time the unsuccessful party is a normal, average party and not a knave, Rule 54(d)(1) would have little substance remaining.'" *National Information Services, Inc., supra,* 51 F.3d at 1472-73.

The district court abused its discretion in denying costs to the prevailing party on the basis of plaintiff's good faith alone. Out of respect for the district court's statutory discretion to shift costs, we vacate the award of costs and remand for a re-determination of whether (or to what extent) costs should be awarded to the prevailing party and, if not, the reasons for that denial.

CONCLUSION

Because we hold that Pacheco failed to exhaust his administrative remedies with respect to his claim for disparate-impact discrimination, we affirm the district court's Rule 12(b)(1) dismissal of that claim. However, because the district court abused the cost-shifting discretion granted to it under Rule 54(d)(1), we vacate the district court's ruling on the award of costs and remand for a re-determination of whether (or to what extent) costs should be awarded to the prevailing party.

The judgment is AFFIRMED in all respects except as to

costs; the district court's ruling as to costs is VACATED, and the cause is REMANDED to the district court solely for a redetermination, not inconsistent herewith, of whether (or to what extent) costs should be awarded to the prevailing party.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
Sep 14 2004
Clerk, U.S. District Court
Western District of Texas
By /S/_____
Deputy Clerk

CARLOS PACHECO *Plaintiff*

vs.

NORMAN Y. MINETA, *Defendant*

SA-02-CA-1087

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PLAINTIFF'S DISPARATE IMPACT CLAIM

Before the court is Defendant Norman Y. Mineta's Motion to Dismiss (docket no. 69), filed on March 16, 2004 along with the Plaintiff's response. Having carefully considered the arguments before it, the Court finds that it does not have jurisdiction to hear Plaintiff's claim for disparate impact under Title VII because Plaintiff failed to exhaust his administrative remedies for this claim. Therefore, Defendant's Motion to Dismiss should be GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

Carlos Pacheco, a Hispanic male, brings this suit against his employer, the Federal Aviation Administration (FAA), an agency of the federal Department of Transportation (DOT). Plaintiff alleges that the FAA's hiring and promotion policies created a disparate impact upon Hispanic employees and that this impact resulted in his non-selection for a supervisory position. Plaintiff asserts this claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(3) *et seq*, as amended by the Civil Rights Act of 1991. On March 16, 2004, Defendant FAA

filed a motion to dismiss, or in the alternative, for summary judgment, arguing that Pacheco's claim should be dismissed because Plaintiff failed to exhaust his administrative remedies.

Plaintiff is employed by the FAA in Corpus Christi, Texas. In early 2000, he applied for a supervisory position pursuant to vacancy announcement ASW-AT-00-078. Plaintiff was qualified for the position, but was informed on February 28, 2000, that he had not been selected for the position. Believing that his non-selection for the position was the result of Defendant's discrimination against Hispanics, Plaintiff filed a timely complaint of discrimination, [1] referencing the February non-selection, as well as numerous other instances of alleged discrimination. In a notice letter dated June 2, 2000, the DOT's Office of Civil Rights responded to the complaint, characterizing Plaintiff's allegation as one stating a claim for disparate treatment on the basis of national origin.[2]

DISCUSSION

I. Rule 12(b)(1) Standard

Defendant moves to dismiss Plaintiff's disparate impact claim pursuant to Fed. Rule Civ. P. 12(b)(1) and 12(b)(6). When motions to dismiss based on Rules 12(b)(1) and (6) are filed together, a court should consider the jurisdictional attack

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[1] Plaintiff's administrative Formal Complaint did not state a claim of discrimination based on the disparate impact theory. Rather, the administrative complaint which Plaintiff filed on May 22, 2004 described the complained of action as "non-selection for a supervisor's job opening at this facility. Once again the 'good old boy' was selected even though I was more qualified...."

[2] The DOT's June 2000 letter also addressed Pacheco's claims related to earlier instances of alleged discrimination, dismissing them as untimely.

before addressing the attack on the merits.[3] A motion under 12(b)(1) to dismiss for lack of subject matter jurisdiction should be granted "only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief."[4] The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction.[5] Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.[6]

To assess whether subject matter jurisdiction exists, this Court may look to the complaint and the undisputed facts in the record.[7] When analyzing the complaint, the Court treats the allegations in the complaint as true.[8] Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff can prove no set of facts in support of his claim that would entitle plaintiff to relief.[9]

II. Failure to Exhaust

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[3] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

[4] *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998).

[5] *Ramming*, 281 F.3d at 161.

[6] *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

[7] *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996).

[8] *Sawar Partnership v. United States*, 67 F.3d 567, 569 (5th Cir. 1995).

[9] *Home Builders Ass'n*, 143 F.3d at 1010; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Title VII allows federal employees to sue their employer, but requires that they exhaust the administrative remedies provided for by statute prior to bringing suit. [10] Aggrieved employees must first seek administrative resolution of their discrimination complaints before commencing suit in district court.[11] If they fail to do so, district courts are without jurisdiction to hear the merits of their claims.[12]

FAA argues that this Court is without jurisdiction to hear Plaintiff's disparate impact claim because Pacheco did not exhaust the administrative remedies provided by Title VII to address charges of discrimination in federal employment decisions. In support of this contention, the FAA relies on three related arguments. First, it argues that Pacheco's formal administrative complaint failed to include a claim for disparate impact. Second, FAA argues that Plaintiff failed to object when the DOT's Office of Civil Rights framed his EEO complaints as one alleging intentional discrimination on the basis of Plaintiff's race, Hispanic. Finally, FAA argues that since Plaintiff failed to identify a specific, neutral FAA supervisory selection policy that created the alleged, adverse impact in his administrative complaint, he did not exhaust the administrative remedies related to such a claim and cannot pursue it here.

In response to the FAA's motion to dismiss, Plaintiff counters that his statements in the administrative complaint sufficiently alleged that a "good old boy selection process" was

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[10] *Fitzgerald v. Secretary, U.S. Dep't of Veterans Affairs,* 121 F.3d 203, 206 (5th Cir. 1997)(citing 42 U.S.C. 2000e-16(c)).

[11] 42 U.S.C. §2000(e)-16(c).

[12] *Porter v. Adams,* 639 F.2d 273, 276 (5th Cir. 1981)(noting that exhaustion is "an absolute prerequisite" to suit under §2000e-16).

in place, which put the government on notice that Plaintiff was asserting a disparate impact claim in addition to his disparate treatment claim. Plaintiff further points out that there is no requirement that a complainant use the term "disparate impact" in a charge of discrimination.

Defendant concedes this latter point, but maintains that Pacheco's reference to a "good old boy" selection process is insufficient to notify the government that he was asserting a claim under a disparate impact theory. Plaintiff argues that the language he used in his May 2000 EEO complaint and the way the DOT's Office of Civil Rights framed the issue it presented is sufficient to state his disparate impact claim. In support of this, Plaintiff relies upon Supreme Court precedent holding that a Title VII complaint need not contain specific facts that establish a prima facie case under *McDonnell Douglas.*[13]

After careful review of the parties' arguments and the record in this case, the Court finds that it is without jurisdiction to hear the merits of Plaintiff's disparate impact claim. On its face, Plaintiff's EEO complaint reveals nothing more that an employee complaining about how he was treated. Read in the most favorable light, Plaintiff's formal complaint clearly supports claims for unfair and intentional discrimination, but does not even suggest claims under a disparate impact theory. In his EEO complaint, Pacheco alleged that another employee (the "good old boy") was selected, even though Plaintiff was more qualified and had more experience. Pacheco also noted other instances of non-selection which occurred prior to 2000, complaining that less-qualified white applicants were chosen over him in those situations as well. Finally, Plainitff complained of an incident in 1998 in which a photograph of his son was defaced.

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[13] *See Swierkiewicz v. Sorema,* 534 U.S. 506 (2002).

Under any reading, these anecdotes support a claim for intentional discrimination, since they all support Plaintiff's argument that he himself was discriminated against. The DOT's Officeof Civil Rights agreed with this analysis, and communicated this understanding of the complaint to Plaintiff in the June 2000 letter. However, the complaint simply does not even hint at a claim of disparate impact, which would require that Plaintiff allege some neutral employment policy that disproportionately impacts Hispanics.[14] Indeed at his deposition, Plaintiff admitted that he knew of nothing about the supervisory interview process that was discriminatory against Hispanics. Given this read, the Court is unable to conclude that Defendant could have been put on notice that Plaintiff intended to pursue both intentional discrimination and disparate impact claims.

The Court finds, on the facts before it, that Plaintiff has failed to demonstrate that jurisdiction exists. The EEO complaint simply did not put the FAA on notice that Pacheco was alleging that its supervisory selection process created a disparate impact upon Hispanics. Further, when presented with the DOT Office of Civil Rights' June 2002 letter-which characterized his claim solely as one of intentional discrimination-Pacheco failed to correct this description of his claim. Finally, the Court notes that Plaintiff has failed to

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See, e.g., Butler v. MBNA Technology, 2004 W.L.389101(N.D.Tex.Mar.1, 2004) at*6(holding that since the administrative charge of disparate treatment discrimination filed with the EEOC did not contain allegations from which a disparate treatment claim could be expected to grow, plaintiff had failed to exhaust administrative remedies for that claim); *Woodman v. WWOR-TV*, 293 F.Supp.2d 381, 290 (S.D.N.Y 2003)(rejecting disparate impact claim on grounds that "simply gesturing toward the hiring process as a whole will not suffice...[plaintiff] fails to identify a specific, facially neutral employment practice ...").

describe any aspect of the selection process it believes created disparate impact upon Hispanic applicants in general or Pacheco in particular. Because of its resolution of this issue, the Court need not reach the FAA's other, independent grounds in support of its motion to dismiss. Pacheco has failed to meet its burden of showing that he exhausted his administrative remedies related to the disparate impact claim. As a result, the Court is without jurisdiction to hear the merits of Plaintiff's disparate impact claim, and may not reach other grounds for dismissing it.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that Defendant's Motion to Dismiss (Docket No. 69) is GRANTED.

Signed this 14th day of September, 2004.

/S/_____

Royal Furgeson
United States District Judge